Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

BERNICE TAMBASCIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT 0F APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59PP

QUESTIONS PRESENTED

1-Whether the decision affirming the District Court's Judgement is in conflict with the established laws of the United States, and in direct violation with Petitioner's SIXTH Amendment Right to Effective Assistance of Counsel? (Murry v. Carrier, 477 U.S. 478, 496 1986)

2-Whether the decision affirming the District Court's Judgement, is in conflict with the established laws of the United States, and in direct violation with Petitioner's rights to Procedural Due Process-the Court's instructions to the jury, rulings, and refusal to allow Defense Witnesses to testify, evidence not permitted into the trial violating Petitioner's Basic Civil Rights; under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments? (Dimaggio v. Brien, D.C.Pa. 1980, 495 F Supp. 870)

3-Were substantial and injurious effects on the jury, caused by trial error, Prosecutorial Misconduct, repressed evidence blocking access to the Court's admission into evidence, violations to Petitioner under Rule 606b, and Rule 59 and Rule FRCP 56(e)?

4-Did Prosecutorial Intrusion into the Attorney-Client relationship, violate Petitioner's Sixth Amendment Right, and show a realistic possibility that Petitioner was prejudiced by this intrusion? (U.S. v. Schevinmer, 924 F.2d 446-47, (2nd Cir. 1991)

5-Was the failure of the District Court to allow re-examination of the only government witness, and refusal to allow defense evidence, so severe an err as to cause the guilty verdict? (Nevens v. Hamlon, C.A. Neb. 1981, 656 F.2d 3720)

LIST OF ALL PARTIES

Bernice Tambascia, Petitioner

Richard Schecter, AUSA

George Leone, AUSA

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PETITION FOR A WRIT OF CERTIORARI

Bernice Tambascia, pro se, respectfully petitions for a writ of certiorari to review the judgement of the Federal District Court of New Jersey in this case.

OPINIONS BELOW

None. The opinion of the Third Circuit Court of Appeals was unpublished

STATEMENT OF JURISDICTIONAL GROUNDS

The judgement of the Third Circuit Court of Appeals was entered November 2, 1998. The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. Sec.210 (c).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Federal Rule of Civil Procedure 56 (e) provides in relevant part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therein.

Federal Rule of Civil Procedure 15 (a) provides in relevant part:

Otherwise a party may amend the party/s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Amendment Four to the Constitution:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendments IV, V, VI, VIII, and XIV;

STATEMENT OF CASE

Bernice Tambascia was indicted on December 7, 1994, by a grand jury in the U.S. District Court for the district of New Jersey. These charges were multiple counts of fraud, false statements, and obstruction of justice. These charges arose out of an alleged scheme to obtain reimbursement from Medicare and MetLife for durable medical supplies, which the government claimed Tambascia was not entitled. The obstruction charges arose out of Tambascia allegedly suborning false testimony before the grand jury of a government witness.

Tambascia stood trial September 18 – 28, 1995 with a guilty verdict on almost all counts.

Two post-trial motions were timely filed. Counsel's motion September 29, 1995, and Tambascia's motion, October 5, 1995.

On October 23, 1995, substitute counsel was required. Judge Rodriquez entered a favorable order December 12, 1995, granting new counsel.

The transcript took over nine months for completion, and the court received post-verdict briefs on ineffectiveness. The court ruled it lacked jurisdiction and on September 24, 1996, Tambascia was sentenced to 35 months of imprisonment followed by 36 month supervised release, a fine of $7,500.00 and restitution of approximately $220,000.

Tambascia self-surrendered to Danbury Prison Camp on October 18, 1996. Tambascia is currently at Colman Camp in Florida, and will report to halfway house on November 4, 1998 in Philadelphia.

An application for a stay and bail were denied by panels with the Third Circuit of Appeals.

The Third Circuit Court of Appeals affirmed the direct appeal on July 7, 1997, and suggested ineffectiveness claims are best dealt with through 28 U.S.C. § 2255 motions.

Tambascia filed a § 2255 motion and an answer to the government on December 19, 1997, to which the district court judge entered a judgement, stating no affidavits were sent which is incorrect.

Tambascia submitted a request of certificate of appealability on May 13, 1998, and a panel entered a case dispositive order, September 22, 1998, attaching the procedure for filing a petition for a re-hearing in banc.

Tambascia files this Rehearing En Banc request and suggestion for the court and / or panel for reconsideration, as Tambascia's belief in proving innocence is set before you.

Tambascia was denied her request for Rehearing En Banc and panel, on November 2, 1998, and petitions the Supreme Court to grant relief.

ARGUMENT

The Third Circuit Panel's decision affirming the District Court's decision is in conflict with established law of the Third Circuit, and constitutional law. At issue here is the violation of the Fifth, Sixth, Fourth, Eighth, and Fourteenth Amendment rights of Tambascia, and Rule 606 b, 56 e, 15 a, and Rule 60 a. See United States v. Retos, 25 F. 3d 1220, 1228, (1994), and United States v. Camel, 689 F. 2d 31 (1982).

Three defense witnesses offering impeachable testimony were denied access to the jury. Adrian Folcher was present when Strzykalski was told to see a doctor; Gerladine Fielding was present when Strzykalski stated ..."I was told to see a doctor". (Direct Appeal, p 15, lines 12 –13). Kim Tambascia's statement verifying Ms. Fielding's statement. These testimonies are not hearsay and prove Strzykalski recalled the instruction to see Dr. Vittorelli.

The district court judge refusing to allow counsel's ineffectiveness, punished Tambascia by not allowing defense testimony to impeach the government witness and is clear reversible error. The issue of improper jury instruction which further prejudiced Tambascia is raised. This judicial decision was susceptible to interpretation as it removed the prosecutor's burden of proving the elements of intent beyond a reasonable doubt (United States v. Ismail, 97 F. 3d 50, 59 (4th Cir. 1996).

The obstruction count consisted of an alleged question, "Do you recall being sent to the doctor?" asked by petitioner to Strzykalski, who testified she interpreted it as brainwashing. Strzykalski stated the petitioner did not pressure her but she pressured herself, and stated at close of the governments questioning that, "I do not believe Ms. Tambascia had any criminal intent". (Trial transcript p. 1062, lines 8 – 12). Adrian Folcher was present when Strzykalski was told to see a doctor, and he came to court to testify, but trial counsel would not let him. Kim Tambascia was not contacted by counsel but offered both testimony and affidavits including statements that would impeach the government witness. The jury was not allowed to hear or read this evidence. Trial counsel's failure to set-up the proper questions to allow for the witnesses to testify was ineffectiveness. This single error is sufficiently egregious and prejudicial to render counsel's performance ineffective. See Trial transcript, p. 982, lines 12 – 14, Strickland 466 U.S. 690, and Murry v. Carrier, 477 U.S. 478, 496 (1986). Tambascia was found guilty clearly due to these witnesses not being able to testify. Their testimony would have impeached Strzykalski. In Bryant v. Scott, 28 F. 3d 1411, 1418 (5th Cir. 1994), counsel was found ineffective when he failed to investigate alibi witnesses and eye witnesses. Zeitz's failure to cross examine the only government witness in fact precluded counsel from presenting his excellent defense witnesses. Compare United States v. Retos, 25 F. 3d 1220, 1230 (3rd Cir. 1994), where plain error was reviewed as prejudicial.

Plainly, the three witnesses prevented from testifying would have impeached the only government witness. Without the testimony of Strzykalski the government had no case. In United States v. Stewart, 93 F. 3d 189, 193 (5th Cir. 1996), the court erred for restricting cross examination of government's only witness, thus preventing defense counsel from clarifying earlier testimony. Similarly, Strzykalski was not presented back for defense to clarify counsel's failure to cross-examine due to court's error in failure to pursue truth and justice. The court refused to allow Geraldine Fielding, Adrian Folcher, and Kim Tambascia to testify. The court ruled defense counsel at fault for failure to ask introductory questions. The court further prejudiced the case in instructing the jury to consider the Strzykalski testimony as fact. Clearly, petitioner's Sixth Amendment rights were violated. In Coy v. Iowa, 487 U.S. 1012. 1021, (1988), the court was in error for not allowing testimony via legislative shield. In Davis v. Alaska, 415 U.S. 308, 316 (9th Cir. 1974) the court erred by not permitting cross-examination regarding bias in making a faulty identification of defendant. Also, United States v. Landerman, 109 F. 3d 1053, 1062 (5th Cir. 1997), the court erred for prohibiting impeaching testimony of government witness by inquiring on plea agreement. Clark v. O'Leary, 852 F. 2d 999, 1005-08, (7th Cir. 1988), where the court erred for not permitting key witness to be questioned regarding prejudice. In United States v. Vargas, 933 F. 2d 701, 706 (9th Cir. 1991), the court erred for refusing to allow government witness to be cross examined about prior hearsay testimony.

Also, United States v. Lang, 904 F 2d 618, 625 (11th Cir. 1990), the court erred by admitting grand jury testimony of a witness because that testimony bore insufficient indicia of reliability as in the Strzykalski testimony against Tambascia at trial. The court compounded the ineffectiveness of counsel to irreparable harm and caused the jury to find Tambascia guilty, which was in error.

The District Court Judge failed to use any other investigative source when determining the Restitution amount in the Sentencing, and relied solely on the PSI for his finding. The PSI incorrectly charged Petitioner for double the amount, as the government withheld funds in the amount of approximately $40,000 by way of MedFast. The Court failed to arrive at the correct restitution amount and Petitioner suffers Double Jeopardy as the result of this order and requests a remand for a hearing on this matter to provide Petitioner with her rights to a fair trial.

FLORIDA SUBSET

Ineffectiveness of trial counsel caused the guilty verdict in the Florida subset, as well as, improper court proceedings. At sentencing new defense counsel raised the issues of mens rae by reading a letter from Florida Medicare to Nick Diguilio, government investigator, following upon proffered information given by Tambascia. (Sentencing transcript, p. ___, lines ___). This letter explained the defense position that under 42 U.S.C. 1445pp., medical suppliers are entitled to payment when

they do not know otherwise, and either physician ordering or beneficiary does not know entitlement. It provides proof that Tambascia did not know the billing system and was only trying to get paid on equipment supplied.

Defense counsel failed to use the Brady material in court or provide any evidence by way of available defense witnesses he chose not to call. Please see affidavits of Florida reps attached and in the sentencing record. In Baylor v. Estelle, 94 F. 3d 1321 (9th Cir. 1996), counsel was ineffective in a rape case for failing to use and follow up on exculpatory semen report that would have created reasonable doubt. Similarly, Williams v. Washington, 59 F. 3d 673, 679-83 (7th Cir. 1995), counsel failed to read letter written by victim of assault case detailing incident and interview witnesses tending to support defendant's credibility. Tambascia's counsel failed to even try to support defendant's credibility. Tambascia's counsel failed to even try to admit or read this Florida Medicare letter to the court, and failed to interview Florida defense witnesses.

The court erred by not dismissing the case when the prosecutor bribed Dr. Pierce, one of the Florida physicians, to provide false testimony to the court. In United States v. Retos, 25 F. 3d 1220, 1228 (3rd Cir. 1994), citing United States v. Olano, 113 S.Ct. 1770 (1993), error is defined as "a deviation from a legal rule". The decision to grant relief under the plain error rule is vested in this Third Circuit court of judges.

In the Patti Folcher testimony at trial prosecutorial misconduct was likewise cited. See trial transcript, p. 17,lines 1-20 .

NEW JERSEY SUBSET

The ineffectiveness of counsel to fail to provide available testimony from the patients who were able and willing to testify as per their attached affidavits, which were written into the sentencing record, is plain constitutional error. These patients were investigated prior to trial, but not contacted by defense counsel despite Tambascia's strong requests to present them. Dr. Mills had told the court he "never authorized the equipment to the beneficiaries". Alan Hart, investigator, submitted written reports on all patients which stated Dr. Mills monitored and know he had prescribed the units. The patients' testimony was vital to the truth that Dr. Mills had in fact authorized the lymphadema pumps and leg garments. As in Harris v. Reed, 894 F. 2d 871, 878 (7th Cir. 1990, en banc), where counsel's strategy not called witnesses fell outside "the range of professionally competent assistance". The same applies to this case where counsel did not investigate or call witnesses at trial. Prior to sentencing M. Kerry Tucker of Investigative Resources, Inc., provided the district court judge with affidavits of Dr. Mill's patients and all the living patients came to sentencing, but the judge dismissed them. These affidavits provide, clearly, impeachable material for the testimony of Dr. Mills. See United States v. Retos, where the court of appeals has discretion to grant relief.

The district court judge further prejudiced Tambascia by denying her § 2255 motion on the basis that the patient affidavits did not exist.

These affidavits are part of the record and were sent in response to the prosecutor's answer. See judgement denying § 2255 motion, p. 4, lines 10-15. This clearly demonstrates plain error and is in conflict with the decision of the Third Circuit Court.

Prosecutorial Misconduct throughout court proceedings violated Tambascia's rights to a fair trial. U.S. v. Relos, 25 F. 3d 1220, 1230, and U.S. v. Tuerks, 41 F 3d 893, both (3rd Cir. 1994). The court erred for failing to dismiss the case, and defense erred for failing to read Leann Strzykalski's grand jury testimony into the record, violating Tambascia's rights to a fair trial.

Tambascia sent a fax, privileged Attorney-Client communication, to her defense counsel, which the prosecutor proffered through subpoenaed files. The prosecutor told the court, without jury present, that he used this letter to call Leann and Marie Strzykalski back to his office after their Grand Jury testimony and secured their changed testimony, and added the obstruction count.

Leann Strzykalski testified at the grand jury, "Tambascia never signed doctor's names nor directed others to". Trial testimony stated, "Tambascia forged doctor's names, and others did as well", after the prosecutor used this Attorney-Client Privileged communication to intimidate this witness. Her recall was altered after the witness tampering from the prosecutor as with Patti Folcher testimony.

Patti Folcher testified at trial, the prosecutor instructed her to lie and blame Tambascia for the crime of forgery and false statements. Patti Folcher wrote a letter apologizing to the court for screaming at the prosecutor, not for misstating a fact, but the judge ordered the prosecutor read grand jury testimony, and the jury used that grand jury testimony only. The judge violated Tambascia's rights to a fair trial, and the defense counsel was ineffective for not reading the Leann Strzykalski grand jury testimony to the jury. The use of Privileged communication to intimidate Marie Strzykalski, further damaged the fairness of the trail.

Conclusion

This petitioner, Bernice Tambascia, respectfully requests this Supreme Court to consider the evidence as stated and review the case, as conviction of an innocent person still is immoral and unconstitutional, and it is my deepest hope to have a fair hearing according to the rules this nation has set forth.

This petitioner, Bernice Tambascia, respectfully requests this court to Vacate the Third Circuit decision and reverse her conviction and direct the district court enter a judgement of acquittal, or grant a new trial.

Bernice Tambascia

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5621

UNITED STATES OF AMERICA
v.
BERNICE TAMBASCIA,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 94 – cr-00616)
District Judge: Honorable Joseph H. Rodriguez

Submitted Pursuant to Third Circuit LAR 34.1 (a)
June 24, 1997

Before: GREENBERG, MCKEE, and WELLFORD,
* Circuit Judges.

Filed JUL – 7 1997

* The Honorable Harry W. Wellford, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

MEMORANDUM OPINION

McKee, Circuit Judge.

In this appeal, we are asked to review appellant Bernice Tambascia's judgement of conviction and sentence for nine counts of mail fraud (18 U.S.C. § 1341), six counts of making a false statement on a Social Security application (42 U.S.C. § 1320a – 7b), and one count of obstruction of justice (18 U.S.C. § 1503). She alleges that the district court abused its discretion in not admitting evidence that would have impeached the government's sole witness on the obstruction count, that 18 U.S.C. § 1503 was not applicable to her conduct, and alternatively that there was insufficient evidence to convict her under that statute, and the district court improperly instructed the jury on that count. Her final contention is that the district court erred in ruling that it was without jurisdiction to consider her ineffective assistance of counsel claim. For the reasons explained below, we will affirm.

I.

Bernice Tambascia is the sole owner of Med-Fast, Inc., a company operated out of her home in Cherry Hill, NJ. Med-Fast provides durable medical equipment to Medicare and some privately

insured patients. The instant charges relate to her company's distributions of lymphedema pumps. The government charged Tambascia with defrauding a Florida and New Jersey Medicare insurance carrier and a private insurance company.

Florida Medicare Carrier

Before companies like Med-Fast can receive reimbursement for providing a segmental lymphedema pump, Florida Blue Cross / Blue Shield requires that the supplier first rent a cheaper model pump (a non-segmental pump) for thirty days. A doctor must then certify that the patient has lymphedema and needs the more expensive segmental pump. Med-Fast's Florida salesmen were not aware of these prerequisites to reimbursement. Therefore, when they submitted claims for the segmental lymphedema pump, their claims were denied because they had not submitted proof that the non-segmental pumps had first been provided. Tambascia instructed her New Jersey employees to resubmit the claims after back dating them, forging a physician's signature, and certifying that the patient had tried the non-segmental pump but that it was ineffective. In fact, none of the fifty-two patients who obtained segmental pumps from Med-Fast had used the cheaper pump. Florida Blue Cross / Blue Shield issued Med-Fast approximately $200,000 in reimbursement on the resubmitted claims.

New Jersey Medicare Carrier

The New Jersey Medicare carrier (Pennsylvania Blue Shield) reimbursed Med-Fast for segmental pumps that it had provided for nine patients of podiatrist Dr. Gregory Mills. All of the claims represented that Dr. Mills had certified that these pumps were medically necessary. On three of the claims, Tambascia had forged Dr. Mill's signature. The other six claims contained unauthorized signatures of Dr. Mills.

Metropolitan Life Insurance Co.

Tambascia also provided a lymphedema pump to her friend, Marie Strzykalski, even though Strzykalski had not been examined by a doctor and no doctor had certified that the pump was medically necessary. Tambascia then submitted a forged prescription to Strzykalski's private insurance company, Metropolitan Life Insurance Co. The prescription represented that a specific physician had ordered the pump for Strzykalski. Metropolitan paid Strzykalski $983 on this claim, and Strzykalski gave the payment to Tambascia.

Based on this conduct, Tambascia was charged with ten counts of mail fraud and eight counts of making false statements. She was also charged with two counts of obstruction of justice in

connection with a telephone conversation she had with Strzykalski during the grand jury's investigation. According to Strzykalski, Tambascia tried to "reprogram" her memory and get her to recall that Tambascia had instructed her to see a doctor. Strzykalski testified that she felt pressured to "[remember] what happened in a different way, that what happened." App. at 1272. Tambascia was convicted on nine counts of mail fraud, six counts of making false statements, and one count of obstruction of justice.

Following the conviction, Tambascia's trial counsel moved for acquittal and alternatively for a new trail. Tambascia also filed a pro se motion for judgement of acquittal or new trial in which she incorporated her attorney's arguments and raided four additional ones. The district court held hearings on defense counsel's motion but refused to consider Tambascia's claim of ineffective assistance because it had not been raided in either motion. The court ruled that it had no jurisdiction to hear the claim and denied both post-verdict petitions. The district court then sentenced Tambascia to thirty-five months imprisonment and ordered her to pay restitution in the amount of $220,200.01 and a fine of $7500. This appeal followed.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Tambascia contends that the district court misinterpreted Federal Rule of Evidence 613 (b) and erroneously excluded defense evidence that would purportedly have impeached the government's sole witness on the obstruction counts (Strzykalski). Tambascia attempted to impeach Strzykalski with a prior statement, but the district court required her to confront the witness with the statement before it could be introduced for impeachment.

Rule 613 (b) provides that

(e) xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Fed. R. Evid. 613 (b). The advisory Committee notes to this rule explain that "[t]he traditional insistence that the attendance of the witness be directed to the statements on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence." Fed. R. Evid. 613 (b) (Advisory Committee Notes to Subdivision (b)) (emphasis added). Some courts have interpreted this note to mean that "the foundational prerequisites of Rule 613 (b) require only that the witness be permitted-at some point-

to explain or deny the prior inconsistent statement." United States v. Young, 86 F. 3d 944, 949 (9th Cir. 1996); see also United States v. Hudson, 970 F. 2d 948, 955 (1st Cir. 1992). A court has the discretion, however, to require that the witness first be confronted with the statement before the impeachment evidence is introduced. See United States v. Sutton, 41 F. 3d 1257, 1260 (8th Cir. 1994), cert. denied, 115 S. Ct. 1712 (1995).

Here, Tambascia tried to introduce the testimony of Marie Fielding to impeach Marie Strzykalski's testimony on the obstruction counts. Strzykalski testified that Tambascia tried to "reprogram" her and get her to recall that Tambascia had instructed her to see her physician about the lymphedema pump when in fact Tambascia had never instructed her to do so. See app. at 1270-72. Fielding allegedly would have testified that

(she) was at a Christmas dinner at (Tambascia's) house, Christmas '92 and Maria Strzykalski was there with (Tambascia) and/or other people. It was a social occasion and (she had) . . . a discussion with Maria Strzykalski about medical problems . . . and Maria Strzykalski told her about the boot that she had ordered and . . . (said) that she had to be (sic) told to go see a doctor.

App. at 1693. The district court ruled that this testimony could not come in because Strzykalski had not been cross examined specifically about this Christmas Dinner conversation and therefore

Fielding's testimony was not impeachment but inadmissible hearsay. See app. at 1694, 1696 – 98. However, that statement was not hearsay.[1]

It is axiomatic that a hearsay statement is one that is admitted to prove the truth of the matter asserted. A prior inconsistent statement "is admitted not for the truth of the matter asserted in the prior statement but to impeach the credibility of the witness." United States v. Martin, 694 F. 2d 885, 888 (1st Cir. 1982); see also United States v. White, 11 F. 3d 1446, 1448 (8th Cir. 1994) (inconsistent statements come into evidence as non-hearsay). Fielding's testimony was offered only to cast doubt on the credibility of Strzykalski's claim that she had not been told to see a doctor about the lymphedema pump. Therefore, that testimony was not hearsay, and the district court erred in concluding otherwise.

We nevertheless affirm the district court's exclusion of that testimony on the alternative ground that the foundational prerequisites of Rule 613 (b) had not been satisfied. See ACLU v.

Black Horse Pike Reg'l Bd. Of Educ., 84 F. 3d 1471, 1477 (3d Cir. 1996) ("It is well-established . . . that ' if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. ' "). Although the requirement that the witness be confronted with her inconsistent statement on cross-examination has been relaxed, the rule requires that counsel lay some foundation for the inconsistent statement. To satisfy this requirement, it is sufficient for counsel to cross-examine the witness about the time or place at which the statement allegedly was made. See, e.g., United States v. Young, 86 F. 3d 944, 949 (9th Cir. 1996) (foundational prerequisites of Rule 613 (b) met where witness was asked whether he had ever "gone to Flash's (Adams's) house in November 1994, which is where {defendant} alleged that {witness} made the inconsistent statement"); White, 11 F. 3d at 1448 (foundational prerequisites of Rule 613 (b) met where witness was specifically questioned about statements she make to the person who would be called to impeach her). For example, in United States v. McLaughlin, 633 F. 2d 949 (9th Cir. 1981), on which Tambascia relies, the defendant sought to impeach his former accountant's testimony. The accountant had testified that "he had advised McLaughlin that it was necessary to withhold federal taxes from the . . . second checks." Id. at 952. McLaughlin wanted to

testify that his former accountant had said the opposite at a 1977 meeting. On cross-examination, defense counsel questioned the accountant about the time, place, and persons present at that meeting but did not specifically ask him about the statements he made there. The Ninth Circuit held that this questioning satisfied "the minimal foundational requirements of Rule 613 (b)," and therefore it was error for the district court to exclude McLaughlin's proffered testimony. Id. at 953.

Here, defense counsel did not question Strzykalski about the 1992 Christmas dinner or question her about conversations with Fielding. Therefore, there was no foundation in the record for defense counsel to introduce a statement Strzykalski allegedly made at that dinner. The mere fact that Strzykalski testified that Tambascia had not instructed her to see a physician did not lay a foundation under Rule 613 (b). Accordingly, we affirm the district court's exclusion of Fielding's testimony.[2]

III.

Tambascia claims that her conviction for obstruction justice

in violation of 18 U.S.C. § 1503 should be vacated on three alternative grounds: (1) the government failed to state an offense; (2) there was insufficient evidence to support her conviction; and (3) the district court improperly instructed the jury on this count. We find all of these arguments without merit and accordingly affirm her conviction.

A. Failure to State an Offense

Tambascia contends that her conviction under the omnibus clause of 18 U.S.C. § 1503 cannot stand because that provision does not apply to witness tampering.[3] That clause provides that

[w] hoever . . . corruptly or by threats of force, or by any threatening letter of communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .

18 U.S.C. § 1503. One circuit court of appeal has held that this section does not proscribe witness tampering in light of Congress's subsequent passage of 18 U.S.C. § 1512 which specifically punishes such conduct. See United States v. Hernandez, 730 F. 2d 895, 898 (2d Cir. 1984) ("[We] conclude that congress affirmatively intended

to remove witnesses entirely from the scope of § 1503."). We decline to adopt that view and instead join the clear majority of the circuits that have held that section 1503 does reach such conduct. See United States v. Maloney, 71 F. 3d 645, 659 (7th Cir. 1995), cert denied, 117 S. Ct. 295 (1996); United States v. Moody, 977 F. 2d 1420, 1423 – 24 (11th Cir. 1992); United States v. Kenny 973 F. 2d 339, 342 (4th Cir. 1992); United States v. Wesley, 748 F. 2d 962, 964-65 (th Cir. 1984).

A "fundamental rule of statutory construction is that ' the meaning of a statute must, in the first instance, be sought in the language in which the act is framed,' "Kenny, 973 F. 2d at 342, and nothing in the language of section 1503 excludes the conduct at issue here. Although we recognize that 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant") expressly proscribes witness tampering, that fact "does not preclude application of § 1503 [to such conduct] . . . . so long as the defendant is not punished under both statutes for the same conduct." Kenny, 973 F. 2d at 342. Accordingly, we conclude that the government did charge an offense punishable under section 1503.

B. Insufficient Evidence

In the alternative, Tambascia alleges that there was insufficient evidence to convict her under 18 U.S.C. § 1503. We

employ the following standard of review when considering such a challenge:

[A]n appellate court must sustain the verdict of a jury if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. In determining whether evidence or determine the credibility of witnesses. Appellate reversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution is clear. The evidence need not be inconsistent with every conclusion save that guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt.

United States v. Carr, 25 F.3d 1194, 1201 (3d Cir. 1994) (quoting United States v. Casper, 956 F. 2d 416, 421 (3d Cir. 1992)). A defendant challenging the sufficiency of the evidence bears a heavy burden. Tambascia has not met that burden here.

Construed in the light most favorable to the government, there was sufficient evidence in the record to convict her of obstruction of justice in connection with contact she made with government witness Strzykalski during the grand jury's investigation. Strzykalski testified that, in between her tow grand jury appearances, Tambascia telephoned her and claimed "that she had told [Strzykalski] to go to a doctor." App. at 1268. When Strzykalski responded that she had not been told that "[Tambascia]

was upset" and "reminded [Strzykalski] that she had told me." App. at 1270. In describing this conversation, Strzykalski testified that she felt that Tambascia was trying to "reprogram" her thinking, see app. at 1291: "I felt that I was reminded of what happened in a different way, that what happened for me." App. at 1272. Strzykalski described Tambascia's objective as "getting me to change my mind." App. at 1302. Although Tambascia correctly notes two points in Strzykalski's testimony where she stated that Tambascia did not ask her to lie, see app. at 1290, 1303; in both cases, that testimony was taken out of context. In fact, in response to the direct question " is it a true statement back then and today [] that Bernice never asked you to lie," app. at 1290, Strzykalski answered "no, that's not true," app. at 1291.[4] A jury reasonably could conclude from this evidence that Tambascia had violated 18 U.S.C. § 1503. Cf. United States v. Brown, 948 F.2d 1076, 1080 (8th Cir. 1991) (single witness's testimony that defendant asked her to testify falsely on his behalf was sufficient to support conviction under § 1503).

C. Improper Jury Instruction

Tambascia also alleges that the district court improperly instructed the jury as to the legal prerequisites of 18 U.S.C. § 1503. Specifically, she claims that "[t]he district court failed to instruct the jury on the distinction between attempting to refresh the recollection of a witness . . . and attempting to get a witness to present a false version of events to the grand jury." Appellant Br. at 25 –26. Because Tambascia did not object to this instruction below, we review for plain error. For plain error to exist [t]here must be an "error" that is "plain" and that "affects substantial rights." Moreover, Rule 52 (b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error " 'seriously affect [s] the fairness, integrity or public reputation of judicial proceedings.' "

United States v. Retos, 25 F. 3d 1220, 1228 (3d Cir. 1994) (quoting United States v. Olano, 113 S. Ct. 1770, 1776 (1993)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154 (1977); see also United States v. Turcks, 41 F. 3d 893, 897 (3d Cir. 1994) (citing Henderson), cert. denied, 115 S. Ct. 1716 (1995). This is not that case.

We find no error in the district court's instruction on the obstruction count. That instruction, in relevant part, stated the third element the government must prove beyond a reasonable doubt is that the defendant acted corruptly or corruptly endeavored to obstruct justice. To act corruptly means to act voluntarily and deliberately and for the purpose of improperly influencing or obstructing or influencing or interfering with the administration of justice.

. . . The term endeavor is designed to reach all conduct which is aimed at obstructing justice. Thus, it is sufficient to satisfy this element if you find that the defendant made any effort or did any act that was part of a scheme that would likely have resulted in the obstruction of justice.

. . . The government is not required to prove that the defendant had a specific intent to obstruct justice. The government is only required to establish that the defendant knew that the success of her scheme would likely have resulted in the obstruction of justice; that is, that the defendant should have reasonably foreseen that the natural and probable consequences of the success of her acts would be to obstruct justice.

App. at 2191-92 (emphasis added). No reasonable juror would mistakenly interpret the above instruction as permitting a conviction for merely attempting to refresh the recollection of a witness. The jury was told several times that it must find that

Tambascia acted to interfere with the due administration of justice. We will thus affirm Tambascia's conviction for obstruction of justice.

IV.

Tambascia's final contention is that the district court erred by refusing to consider her post-verdict claim of ineffective assistance of counsel on jurisdictional grounds. She alleges that this claim was properly raised in her pro se motion for new trial filed seven days after the jury returned its verdict. Rule 33 of the Federal Rules of Criminal Procedure requires that motions for a new trial based on grounds other that newly discovered evidence "be made within 7 days after verdict or finding of guilt []." Fed. R. Crim. P. 33. A district court does not have jurisdiction to consider an untimely motion for new trial, see United States v. Smith, 62 F. 3d 641, 648 (4th Cir. 1995); United States v. Brown, 742 F. 2d 363, 368 (7th Cir. 1984); United States v. Dukes, 727 F. 2d 34,38 (2d Cir. 1984); United States v. Hazeem, 679 F. 2d 770, 774 (th Cir. 1982); United States v. Cook, 670 F. 2d 46, 48 (5th Cir.1982), and a defendant may not amend a timely filed motion to raise other grounds after the seven-day period had expired, United States v. Newman, 456 F. 2d 668, 670 (3d Cir. 1972).
We believe that Tambascia is attempting to do just that. Her

pro se motion stated four reasons an arrest of judgement and alternatively a new trial should be granted in her case:

1. This case was tried without valuable testimony of Florida and New Jersey patients.
2. All the New Jersey patients state Dr. Mills prescribed their pump. Alan Hart, a private investigator, has reports on each patient of Dr. Mills . . . which, in fact, admits to his prescribing this unit.
3. There are tow tapes of Ray Taglione who acknowledges responsibility to offer the 1-month trial to all Florida patients.
4. Adrian Folcher has direct knowledge and valuable testimony concerning the Florida patients and would like to come forward with that information.

App. at 31. We construe the filings of pro se defendants liberally. See United States v. Day, 969 F. 2d 39, 42 (3d Cir. 1992) ("We must construe allegations in [a] pro se petition liberally, and w may not subject [the] petition to the standards that we would apply to pleadings drafted by lawyers."); see also Brow v. Farrelly, 994 F. 2d 1027, 1037 (3d Cir. 1993) (same). However to find that Tambascia timely raised a claim of ineffective assistance of counsel in her pro se motion, this Court not only would have to construe her motion liberally but distort the language she used. She simply did not raise a claim of ineffective assistance of trial counsel. There is no indication

anywhere in her motion that the evidence allegedly not admitted was the result of counsel's deficiency. See United States v Pinkney, 543 F. 2d 908, 916 (D.C. Cir. 1976) ("[A] motion charging ineffective assistance of counsel must set forth evidence upon which the elements of a constitutionally deficient performance might properly be found.").

We note that Tambascia is not without remedy here. She may collaterally challenge her trial counsel's performance. We have previously stated that this is the preferred vehicle for raising such challenges.

[D]efendants prejudiced by ineffective assistance of counsel have a ready remedy. They may mount a collateral challenge by a federal habeas petition as allowed by 28 U.S.C. § 2255. That mechanism, rather than a new trail, seems best to accommodate the interests in finality and fairness with respect to ineffective assistance of counsel claims.

United States v. DeRewal, 10 F. 3d 100, 105 (3d Cir 1993) (quoting United States v. Ugalde, 861 F. 2d 802, 809 (5th Cir. 1988)). We emphasize, however, that we take on position whatever on the merits of any claim she may raise under section 2255.

V.

For the reasons set forth above, we affirm the district court's judgement of conviction and sentence entered on September

19, 1996.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

S/_____
Circuit Judge

DATED: JUL – 7 1997

FOOTNOTES

1 Because the district court ruled as a matter of law that Fielding's testimony was inadmissible, it is not appropriate to consider the court's requiring that Strzykalski be confronted with her statement before that testimony was introduced as a discretionary decision. Rather, the court made an error of law.

2 Even if it was error to exclude Fielding's testimony when offered, that error was harmless because the court did give defense counsel the opportunity to recall Strzykalski, see app. at 1698, so that counsel could lay the proper foundation for that testimony, and Strzykalski was available on the day counsel was afforded that opportunity, see app. at 1934 –35.

3 Tambascia failed to raise this issue below and therefore we review for plain error. Certainly, if her conduct was not criminal, then a conviction based on that conduct would affect her substantial rights and thus constitute plain error.

4 This case is distinguished from United States v. Brand, 775 F. 2d 1460 (11th Cir. 1985), because the evidence here does not suggest that Tambascia was "mere[ly] attempt[ing] to secure a statement from a potential witness," id. at 1470

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5621

UNITED STATES OF AMERICA
v.
BERNICE TAMBASCIA,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 94 – cr-00616)
District Judge: Honorable Joseph H. Rodriguez

Submitted Pursuant to Third Circuit LAR 34.1 (a)
June 24, 1997

Before: GREENBERG, MCKEE, and WELLFORD,
* Circuit Judges.

JUDGEMENT

* The Honorable Harry W. Wellford, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

After careful review of the record and consideration of all the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the district court's judgement of conviction and sentence entered September 19, 1996, be and is hereby affirmed.

ATTEST:

_____

Bradford A. Baldus
Chief Deputy Clerk

Jul -7 1997

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.98-5200

BERNICE TAMBASCIA,

v.

THE UNITED STATES OF AMERICA

On appeal from the United States District Court
For the District of New Jersey
(D.C. No. 97-cv-04826)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE AND RENDELL, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby **DENIED**.

By the Court,

United States Circuit Judge

Nov 02 1998
LRB/cc:BT,GL,RS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BERNICE TAMBASCIA,
Petitioner
v.
UNITED STATES OF AMERICA
Respondent

Hon. Joseph H. Rodriguez
Civil Action No. 97-4826
Criminal Action No. 94016
ORDER

This matter is before the court on petition of Bernice Tambascia for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. After carefully considering the submissions of the parties, and for the following reasons, the court denies the motion.

BACKGROUND

On September 11, 1995, petitioner was tried on a twenty (20) count indictment charging her with mail fraud, making false statements, and obstruction of justice. These charges arose out of her scheme to defraud Medicare insurance carriers and one private insurance company through false prescriptions for lymphedema pumps that she sold. Petitioner was convicted on September 28, 1995 by a jury of nine (9) counts of mail fraud; six counts of making false statements to a Medicare insurance carrier; and one (1) count of obstruction of justice. [1]

Immediately following her conviction, petitioner's attorney moved for a judgement of acquittal or in the alternative, a new trial, raising a number of issues. Petitioner subsequently filed her own pro se motion seeking the same remedies, but raised a few additional grounds for relief. These motions, none of which included a count for ineffective assistance of counsel, were heard and denied on September 19, 1996. Petitioner was also sentenced on this date, and received a total term of thirty-five (35) months incarceration, and three (3) year term of supervised release, total restitution of $220,100.01, a total fine of $7,500.00, and a prohibition on working in certain positions within the medical field. This sentence and the underlying conviction were affirmed by the United States Court of Appeals for the Third Circuit on September 19, 1996.

DISCUSSION

Petitioner filed the instant petition pursuant to 28 U.S.C. § 2255 on September 30, 1997. Her primary claims are based on ineffective assistance of counsel and prosecutorial misconduct, but she also claims that she is entitled to a downward departure in her sentence for various reasons.

A. Ineffective Assistance of Counsel

Petitioner point to may separate incidents that she claims demonstrate how her counsel performed so deficiently as to

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government's case.

violate the Sixth Amendment right to counsel. Generally, she claims that her attorney refused to present witnesses that would have helped her, and that he deceived petitioner about different aspects of the case.

The United States Supreme Court and the Third Circuit Court of Appeals have clearly articulated a two-pronged test for determining whether relief may be granted on claims of ineffective assistance of counsel. A petitioner must show: (1) that counsel made errors so serious that counsel's representations fell below an objective standard of reasonableness, and (2) that such failure resulted in prejudice so as to deprive the petitioner of a fair trail, that is, a trial whose result is reliable. Zettlemoyer v. Fulcomer, 923 F. 2d 284, 295 (3d Cir.) (citing Strickland v. Washington, 466 U.S. 668, 688 (1984), cert. denied, 502 U.S. 902 (1991). "Acts or omissions of counsel that are alleged not to have been the result of reasonable, professional judgement" must be identified and "the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside of the wide range of professionally competent assistance." Strickland, 466 U.S. at 690; see Zettlemoyer, 923 F. 2d at 295. Furthermore, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgement." Strickland, 466 U.S. at 690.

Petitioner lists the names of several people that her attorney supposedly failed to call as witnesses. She states that had these people testified, she would not have been convicted because they would have contradicted the testimony of Dr. Mills, a chief government witness. As the government points out in its Answer to petitioner's § 2255 motion, petitioner does not claim to have any evidence (other than the testimony that these witnesses would allegedly have given) to show that Dr. Mills did prescribe lymphedema pumps for those patients. Furthermore, petitioner's claims are not substantiated by anything other than her own words. She has not submitted any evidence via affidavit or otherwise[2] of what these people would say if called to the stand, but instead provides her own description of their testimony – simply that Dr. Mills prescribed the lymphedema pump.

Given these facts, the decision of petitioner's attorney not to call these witnesses did not fall below an objective standard of reasonableness. Calling these witnesses could have been detrimental to the defense because it could have focused the jury's attention on the testimony of other witnesses who stated that they did not believe that Dr. Mills had prescribed the pump. Given the deference afforded to strategic trail decisions, even if calling these witnesses would have been helpful to petitioner's case, which may or may not have been the case since

It is uncertain exactly what these witnesses would say, [3] the failure to call them does not render counsel's performance ineffective. As the Third Circuit recently noted, "(o)ur review of ineffective. Assistance of counsel claims does not permit us with the benefit of hindsight, to engage in speculation about how the case might best have been tried." Hess v. Mazurkiewicz, 1998 WL 47647, *1 (3rd Cir. 1998). See Government of Virgin Islands v. Weatherwax, 77 F. 3d 1425, 1434 (3d Cir.) ("Several courts have also recognized witness selection as being among the non-fundamental decisions that counsel is entitled to make at trial.") (citing United States v. Long, 674 F. 2d 848, 855 (llth Cir. 1982) (holding that counsel's failure to call alibi witnesses was not ineffective assistance and stating: "This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses."), cert. denied, U.S., 117 S. Ct. 538 (1996); State v. Davis, 199 Conn. 88, 506 A. 2d 86, 92 (1986) (holding that counsel's refusal to call a witness that his client had instructed him to call did not violate defendant's right to compulsory process); People v. Deere, 41 Cal. 3d 353, 222, Cal. Rptr. 13, 710 p. 2d 925, 931 (1985)

(in bank) ; Wainwright v.Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2509-10, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring) ("(The attorney), not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.")). Accordingly, petitioner's ineffective assistance of counsel claims are without merit.[4]

B. Prosecutorial Misconduct

In her claim of government misconduct, petitioner makes broad allegations that the prosecution made false and misleading statements to the jury, and that it was generally deceitful in its tactics throughout the case.[5] All of these claim, however, consist of nothing more that general, unsubstantiated allegations that amount to little more than name-calling, and that do not point to the existence of any misconduct. Petitioner's claim is therefore without merit and must be denied.

C. Entitlement to a Downward Departure

Finally, petitioner maintains that she is entitled to a

downward departure in her sentence for her post-conviction rehabilitation.[6] While it is true that post-offense or post-conviction rehabilitation efforts can be a factor in deciding to apply a downward departure under § 3E1.1 of the Federal Sentencing Guidelines for "Acceptance of Responsibility," United States v. Sally, 116 F. 3d 76, 81 (3d Cir. 1997), it is also true that this only relates to what the court may consider at sentencing. Since her sentence has already been rendered by this court and affirmed by the Court of Appeals, petitioner cannot now claim that she is entitled to a downward departure because of conduct she engaged in subsequent to sentencing. More importantly, even if petitioner had not yet been sentenced and her most recent rehabilitation efforts were considered, her repeated denials of any culpability, her claims that she was wrongfully convicted and her allegations that the government lied about her criminal activity belie any acceptance of responsibility.[7] Petitioner's attempts at rehabilitation are

surely admirable, but they cannot influence an already rendered sentence that was valid and appropriate.

CONCLUSION

For the foregoing reasons:

IT IS ORDERED on this 23rd day of March, 1998, that motion of petitioner, Bernice Tambascia for writ of habeas corpus pursuant to 28 U.S.C. § 2255 is DENIED.

IT IS FURTHER ORDERED that no certificate of appealability shall issue.

S/ _____
JOSEPH H. RODRIGUEZ
U.S.D.J.

FOOTNOTES

[1] This verdict included two (2) acquittals – for one count of making a false statement and one count of obstruction of justice. Furthermore, one count of mail fraud and one count of making a false statement were dismissed at the close of the

[2] In her Reply, petitioner does submit her own affidavit, but not one from any of these witnesses.

[3] This highlights petitioner's inability to meet the second prong of the Strickland test – a showing of actual prejudice. Merely stating that certain events would have affected the trial so much as to warrant a different result, without more, does not meet this standard. Having rejected petitioner's claim for her inability to meet the first prong, however, there is no need to analyze the second prong any further.

[4] This conclusion also renders moot petitioner's allegations that her counsel was ineffective for deceiving her by not contacting any of the witnesses that petitioner suggested to him.

[5] As an example of this allegedly malicious behavior by the government, petitioner states that the prosecutor allowed petitioner to sign a proffer agreement based on his oral representations. This was wrong, she claims, because she can not see without her eyeglasses and apparently did not read the agreement. Petitioner does not mention, however, why she was not responsible for reading the agreement she signed.

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[6] It should be noted that this court has received letters from petitioner's friends and acquaintances on her behalf, expressing their belief that petitioner has spent enough time incarcerated to repay her debt to society.

[7] Moreover, even if this issue was raised on direct appeal and denied, it would have been nonreviewable. See United States v. Sally, 116 F. 3d 76, 78 (3d Cir. 1997) ("Generally we lack jurisdiction to review a refusal 'to depart downward 'when the district court, knowing it may do so, nonetheless determines that departure is not warranted.' ' ") (quoting United States v. McQuilkin, 97 F. 3d 723, 729 (3d Cir. 1996), cert. denied, U.S. 117 S. Ct. 2413 (1997)).

APS-257 July16,1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A.No.98-5200

BERNICE TAMBASCIA

V.

UNITED STATES OF AMERICA

(D.N.J.CIV.NO.97-CV-04826)

Present: CHIEF JUDGE BECKER,NYGAARD And ROTH, CIRCUIT JUDGES

Submitted are:

(1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. { 2253(c)(1);

(2) Appellant's memorandum of law in support thereof; and

(3) Appellant's Brief Showing Probable Cause for Certificate of Appealability",

in the above captioned case.

Respectfully,

Clerk

PDS/SR/clj

----------ORDER----------

The foregoing request for appealability is denied because appellant has failed to make a substantial showing of the denial of a constitutional right.28U.S.C.{2253(c)(2)

By the Court,

Circuit Judge

Dated:Sep 22 1998

LRB/cc:BT